Filed 11/19/08 P. v. Rivero CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RUFINO RIVERO, Defendant and Appellant.	B206390 (Los Angeles County Super. Ct. No. KA081027)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert M. Martinez, Judge. Affirmed in part and reversed in part with directions.

Victoria H. Stafford, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and Eric J. Kohm, Deputy Attorney General, for Plaintiff and Respondent.

Rufino Rivero appeals from the judgment entered following his plea of guilty to assault with a deadly weapon, followed by a court trial in which he was found to have sustained a New Jersey prior conviction (attempted murder), which qualified as a serious felony under Penal Code section 667, subdivision (a)(1), and sections 667, subdivisions (b)–(i), and 1170.12 (the "Three Strikes" law).[1] Defendant contends that the prosecution failed to prove that the New Jersey attempted murder was a serious felony under California law. We agree and accordingly reverse the finding of defendant's prior conviction. In all other respects, we affirm.

BACKGROUND

The assault to which defendant pleaded guilty occurred on November 3, 2007, when defendant stabbed the victim during an argument between the two at a parking lot in Pomona where transients often slept.

At trial on the prior conviction, the prosecutor produced certified copies of documents which reflected that defendant had been charged with offenses arising out of an incident in September 1987, including attempted murder in violation of New Jersey Statutes 2C:5-1/2C:11-3. In 1988, defendant entered a guilty plea to the attempted murder charge and was sentenced to 10 years in prison. A section of the New Jersey written judgment captioned "Reason for Imposition of Sentence" states: "This is the defendant's second offense involving a knife. The victim was seriously injured and this is a first degree crime with a presumptive term of 15 years . . . Prosecutor's recommendation of 10 years incarceration is appropriate." A "criminal arrest" card prepared when defendant was arrested in September 1987 provides as a "Brief History of this Particular Criminal Offense" that "Subject stabbed [victim] in the abdomen after a brief arguement [*sic*]."

Defendant argued in the court below that the New Jersey conviction did not constitute a serious felony conviction under California law because the definition of

---

[1] Unless otherwise specified, further section references are to the Penal Code.

"attempt" is broader in New Jersey than in California, the criminal arrest card was not competent evidence, and no other evidence demonstrated that defendant had personally used a deadly weapon. The trial court agreed that the New Jersey law of attempt did not control in California and that the criminal arrest card could not be considered. But noting that the judgment itself referred to a knife and defendant was the only one charged, the court concluded that the New Jersey offense qualified as a serious felony conviction in California under section 1192.7, subdivision (c)(23).

Defendant was sentenced to the low term to two years for assault, doubled under the Three Strikes law to four years, plus a five-year enhancement under section 667, subdivision (a)(1), for a total sentence of nine years in state prison.

DISCUSSION

"Under our sentencing laws, foreign convictions may qualify as serious felonies, with all the attendant consequences for sentencing, if they satisfy certain conditions. For a prior felony conviction from another jurisdiction to support a serious-felony sentence enhancement, the out-of-state crime must 'include[] all of the elements of any serious felony' in California. (§ 667, subd. (a)(1).) For an out-of-state conviction to render a criminal offender eligible for sentencing under the three strikes law (§§ 667, subds. (b)–(i), 1170.12), the foreign crime (1) must be such that, 'if committed in California, [it would be] punishable by imprisonment in the state prison' (§§ 667, subd. (d)(2), 1170.12, subd. (b)(2)), and (2) must 'include[] all of the elements of the particular felony as defined in' section 1192.7(c) (§§ 667, subd. (d)(2), 1170.12, subd. (b)(2))." (*People v. Warner* (2006) 39 Cal.4th 548, 552–553, fn. omitted.)

"Whether a crime qualifies as a serious felony is determined by section 1192.7, subdivision (c) . . . ." (*People v. Warner*, *supra*, 39 Cal.4th at p. 552.) Attempted murder is a serious felony. (§ 1192.7, subd. (c)(9).)[2] "[A]ny felony in which the defendant

---

[2] Attempted murder also qualifies as a violent felony for enhancement purposes under section 667.5, subdivision (c)(12).

personally used a dangerous or deadly weapon" is also a serious felony. (§ 1192.7, subd. (c)(23).)

1. Elements of Attempted Murder

Citing the rule that an appellate court reviews the decision of the trial court, not its reasoning (see *People v. Herrera* (2000) 83 Cal.App.4th 46, 65), the Attorney General argues that attempted murder in New Jersey includes all of the elements of attempted murder in California. We disagree.

In California, "[a]n attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (§ 21a.) New Jersey Code of Criminal Justice section 2C:5–1, under which defendant was convicted, defines "criminal attempt" as including "an act or omission constituting a substantial step in the course of conduct planned to culminate in [the defendant's] commission of the crime"(*id*., subd. a(3)), if the course of conduct "is strongly corroborative of the actor's criminal purpose (*id*., subd. b). New Jersey's formulation of the law of attempt is taken from the language of the Model Penal Code. (*State v. Fornino* (1988) 223 N.J.Super. 531, 537–538 [539 A.2d 301, 304].)

The Attorney General points to several similarities between the New Jersey and the California law of attempt. Although many similarities do exist, in *People v. Dillon* (1983) 34 Cal.3d 441, our Supreme Court explained that the law of intent requires the trier of fact to be "convinced beyond a reasonable doubt that the defendant intended to commit a crime and was in the process of attempting to carry out that intent . . . ." (*Id.* at p. 453.) The court further noted that "the draftsmen of the Model Penal Code would require even less, making punishable as an attempt any act or omission that constitutes 'a substantial step in a course of conduct planned to culminate in . . . commission of the crime,' so long as that step is 'strongly corroborative of the actor's criminal purpose.' (Model Pen. Code (Proposed Official Draft 1962) §§ 5.01(1)(c), 5.01(2).) Under this standard, acts normally considered only preparatory [in California] could be sufficient to establish liability. [Citation.]" (*People v. Dillon*, *supra*, 34 Cal.3d at pp. 453–454, fn. 1.)

Based on our Supreme Court's determination that the California law of attempt is more stringent than the law of attempt set forth in the Model Penal Code (and adopted in New Jersey), we agree with the conclusion of the trial court that defendant's New Jersey conviction of attempted murder did not constitute a serious felony under California law.

2. Personal Use of a Deadly or Dangerous Weapon

Again focusing on the ruling of the trial court rather than its reasoning, the Attorney General asserts that because a certified copy of the New Jersey criminal arrest card was admitted into evidence, the trial could should have accepted the notation that defendant stabbed the victim in the abdomen. Thus, argues the Attorney General, defendant's New Jersey conviction of attempted murder constituted a serious felony because he "personally used a dangerous or deadly weapon" in the commission of the offense, as required by section 1192.7, subdivision (c)(23). Again, we disagree.

"Where, as here, the mere fact of conviction under a particular statute does not prove the offense was a serious felony, otherwise admissible evidence from the entire record of the conviction may be examined to resolve the issue. [Citations.] . . . [¶] Such evidence may, and often does, include certified documents from the record of the prior proceeding and commitment to prison. [Citations.] A court document, prepared contemporaneously with the conviction, as part of the record thereof, by a public officer charged with that duty, and describing the nature of the prior conviction for official purposes, is relevant and admissible on this issue. [Citation.]" (*People v. Miles* (2008) 43 Cal.4th 1074, 1082.)

Here, the New Jersey criminal arrest card was not a court document prepared contemporaneously with the conviction. Nor does it identify the person who wrote the "brief history" indicating that defendant had stabbed the victim or the basis for that "history." (See *People v. Reed* (1996) 13 Cal.4th 217, 230.) Accordingly, the trial court was correct in deeming the criminal arrest card incompetent to establish that defendant had personally used a knife in the commission of the attempted murder.

Finally, as to the trial court's reliance on the New Jersey judgment's recital that this was "defendant's second offense involving a knife" and the fact that defendant was

the only one charged, the Attorney General cites the rule that "the trier of fact may draw *reasonable inferences* from the record presented" on the prior conviction. (*People v. Miles*, *supra*, 43 Cal.4th at p. 1083.) But the New Jersey record does not preclude the possibility that defendant committed the attempted murder with an accomplice who used a knife and that the accomplice may have been charged but tried separately or may not have been charged or brought to trial at all.

As noted in *People v. Miles*, *supra*, 43 Cal.4th at page 1083, "if the prior conviction was for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, the court must presume the conviction was for the least serious form of the offense. [Citations.]" As the record of defendant's prior conviction did not establish that defendant committed the attempted murder with personal use of a knife, the finding that the prior offense constituted a serious felony under California law must fail.

3. Remedy

Defendant acknowledges that retrial of the prior conviction allegation is permissible. (See *Monge v. California* (1998) 524 U.S. 721, 724–726, 734 [118 S.Ct. 2246]; *People v. Monge* (1997) 16 Cal.4th 826, 845; *People v. Barragan* (2004) 32 Cal.4th 236, 239, 243–259; *People v. Hernandez* (1998) 19 Cal.4th 835, 836–838, 843, disapproved on another point in *People v. Seel* (2004) 34 Cal.4th 535, 550, fn. 6.) He nevertheless asserts that remand for retrial is unnecessary "because the New Jersey offense of attempted murder encompasses conduct that would not constitute an attempt in California." We disagree because defendant ignores the possibility of additional evidence being presented to establish his personal use of a knife during the attempted murder, which would qualify his prior conviction as a serious felony.

And even if the prosecution does not seek to retry the prior conviction allegation, remand is necessary for resentencing. Defendant received the low term for the assault offense in this case. If the prior conviction is removed from the sentencing equation, nothing precludes the court from reconsidering its low-term sentence for the assault

conviction. (See *People v. Kelly* (1999) 72 Cal.App.4th 842, 844–845; *People v. Calderon* (1993) 20 Cal.App.4th 82, 88; *People v. Savala* (1983) 147 Cal.App.3d 63, 70.)

DISPOSITION

The finding that defendant sustained a prior conviction is reversed and the matter is remanded for further proceedings in accordance with the views expressed in this opinion. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

DUNNING, J.*

---

* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.